NO. ~~22507~~ 22506

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUN 19 1968

RUSEELL O. LAW,

Appellant,

vs.

JOINT CHECKER LABOR RELATIONS COMMITTEE,
SAN FRANCISCO, an unincorporated association,
PACIFIC MARITIME ASSOCIATION, an unincorporated
association, ILWU, an unincorporated labor union,
ILWU, LOCAL 34, an unincorporated labor union,
MATSON TERMINALS INC., a California corporation,
et al.,

Appellees.

On Appeal from the United States District Court
for the Northern District of California
Southern Division

APPELLANT'S OPENING BRIEF

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment denying the plaintiff relief from action barring him from his livelihood. Appellate jurisdiction of this court is based on 28 USCA 1291. Federal court jurisdiction is based on Section 301 of the National Labor Relations Act, 29 USCA 185 breach of a collective bargaining agreement), 29 USCA 311 (Federal question) and 29 USCA 1337 (commerce). The collective bargaining agreement hereunder involved construction and validity of provisions under 29 USCA 401, et seq. 412 and 414 (Labor and Management Disclosure Act) and 29 USCA 151, et seq. (National Labor Relations Act).

The complaint was filed in the Northern District of California, Southern Division on June 7, 1965. The defendant ILWU is an unincorporated association and labor union with its principal place of business in San Francisco, and the statutory exclusive collective bargaining agent under 29 USCA 151, et seq. for all ship clerks employed in the Port of San Francisco under the collective bargaining agreement and a party to said agreement. The defendant PACIFIC MARITIME ASSOCIATION is an unincorporated association of employers of ship clerks including those employed in the Port of San Francisco and its principal place of business is San Francisco. The defendant MATSON TERMINALS, INC. is a corporation conducting business in the Port of San Francisco and hires ship clerks.

The collective bargaining agreement covering the hours, compensation, working conditions and terms of employment of ship clerks on the Pacific Coast including the Port of San Francisco is wholly in writing and is executed by the defendant ILWU as exclusive bargaining representative of the ship clerks and by the defendant PMA on behalf of the employers and consists of a number of writings, the principal one of which is the master agreement of clerks and checkers, etc. dated April 24, 1952, together with all written addendums and supplements set forth on page 3 of the complaint. This written agreement provides that it may be changed, amended, modified or altered only by a written agreement. The ship clerks in the Port of San Francisco are engaged in the flow of interstate and foreign commerce through said port and are a part of the maritime industry.

The defendant JOINT CHECKER LABOR RELATIONS COMMITTEE, SAN FRANCISCO, is an unincorporated association that conducts the

hiring halls in the Port of San Francisco and dispatches the various clerks from time to time under the collective bargaining agreement to the various employment from time to time. This defendant Committee consists of representatives of the PMA and of the defendant Local ILWU, Local 34, an unincorporated labor union having its place of business in San Francisco and purports to have delegated to it by the defendant ILWU the administration of the collective bargaining agreement for ship clerks in the Port of San Francisco.

The plaintiff RUSSELL O. LAW has been since August 1955 and was until barred from his employment, the subject of this litigation, employed full time as a ship clerk in the Port of San Francisco and dispatched from time to time from the hiring hall in said port as often as he could obtain dispatches. He was during said time a full time member of the working force of ship clerks dispatched under the collective bargaining agreement by the defendant Committee who conducted the hiring hall.

The plaintiff Law was duly dispatched by the defendant Committee from its hiring hall on November 23, 1964, to work as a ship clerk checking cargo as an employee of the defendant Matson Terminal, Inc. He was paid for only 7-1/2 hours and not for the 8 hours he worked, and he took this up through the dispatcher, in the ordinary course of such proceedings. The defendant Matson Terminals initiated a complaint against the plaintiff Law in December by filing a form with PMA, plaintiff's Exhibit "15" (Tr. 208) and the defendant PMA through its employee Kucin wrote a letter of December 3, 1964, to the defendant union, Local 34 (Tr. 209-10), defendant's Exhibit "A". It was not until January 13, 1965, that the dispatcher at the hiring hall directed the

plaintiff Law to go to the union offices at Pier 1-1/2 where he was there told that some kind of charges had been made against him by the defendant Matson Terminals in connection with the S. S. M. M. Dant employment of November 23, 1964. The plaintiff discussed this matter with the officials of the defendant Local 34 at the said meeting and he was advised by the union officials that there was no fault of his; that Law had merely discovered a mistake occurring in the loading which had been immediately corrected and he was assured by the union officials that no blame would attach to him arising out of this incident.

Mr. Law was dispatched from the hiring hall and worked as a ship clerk on January 19th, on January 20th (when he worked for Matson Terminal) and again on January 21st when he worked for Matson Terminal a second time, (Plaintiff's Exhibit "6", Tr. 17), and then he was told by the dispatcher at the hiring hall that he would no longer be dispatched because of action taken by the defendant Joint Checker Labor Relations Committee. (Tr. 16).

Immediately upon learning that he was forever barred from his employment of over 9-1/2 years as a ship clerk, the plaintiff Law on February 1, 1965, sent a written request, Exhibit "A" to the complaint, to the defendant Joint Checkers Labor Relations Committee, to the Area Arbitrator Thomas, to the Joint Coast Labor Relations Committee, and to the Area Labor Relations Committee, San Francisco. This writing states that he had worked for 9-1/2 years and was involved in the state court litigation set forth in that action seeking to determine his rights as a ship clerk and for damages, etc. that he was advised a grievance was filed by Matson Terminals on a matter claimed to have arisen on November 23, 1964, in connection with his employment as a hatch

clerk on the S. S. M. M. Dant and that he had had no notice of any hearing or formal or other written statement of the grievance given to him or his counsel and that he had never had an opportunity to appear and defend this grievance or charge. He set forth that on January 13th he was told at 9:30 in the morning to go to the union Local 34 office of which he was not a member and he there met with a committee and he was orally told that some complaint had been filed against him in connection with the S. S. Dant matter which was fully discussed and it was determined that he was not at fault as he had only discovered a mistake which had occurred in the loading and which was immediately corrected, and he was advised that no blame would attach and the union official Campion stated that the union would stand behind him in this matter and he had a good record in over 9-1/2 years as a ship clerk. The written communication states that if it appears there has been any final action by the Joint Checkers Labor Relations Committee, he requested a hearing, or if the collective bargaining agreement provided for an appeal from the Port Committee then he requested a hearing by the Coast Committee or the Area Committee and request was made for an appeal to the Area Arbitrator Thomas. Law stated in this writing that the first knowledge he had that he was no longer to be dispatched was when he was told on January 22nd and that his request for hearing was set as soon as circumstances permitted. The writing states that he has only been paid for 7-1/2 hours when he actually worked 8 hours on November 23, 1964, and this error had been reported through channels and he asked that this be included in the hearing.

Attached to the complaint as Exhibit "B" is a letter of the Area Arbitrator to the counsel for Mr. Law stating that he was forwarding this communication of February 1, 1965, to the Joint Labor Relations

Committee. Instead of referring to the Master Agreement, Mr. Thomas refers to another agreement, (the Longshore and not the clerk agreement) wherein he sets forth that Section 17 of that other agreement refers to and spells out the steps to be followed in disputes and that 17.62 reserves to the Coast Committee and the Coast Arbitrator matters pertaining to the dispatch hall, interpretation of working and dispatching rules or discharges, and that in the event the Coast Committee disagrees he issue then goes to the Coast Arbitrator. Reference is made to that letter for further particulars.

Exhibit "C" to the complaint is a letter by Law's counsel to Thomas, the Area Arbitrator, dated February 17th acknowledging receipt of the letter of February 8th. It states that so far as counsel knew the grievance did not pertain to registration nor to dispatch hall nor to interpretation or dispatch rules nor to discharge and states that neither Law nor his counsel have seen any complaint filed by the employer purporting to charge Law with doing something wrong as acting in defiance of an order of his superior. That he actually corrected a mistake in the loading of the ship which he discovered and that this is proper conduct of a ship clerk and no grounds for a grievance nor for punishment. It states that Law had at no time been given charges nor other than a third or fourth hearsay knowing what these charges were and that Law has never had an opportunity of hearing nor to appear before the Port Committee, or to present facts and he learned that he was tried without notice and without hearing and without evidence and that he was punished for something he did not do and that promptly upon learning this he sent his notice of February 1st. This letter, Exhibit "C" to the complaint, sets forth that Section 21 of the Master Agreement of 1952 or if he is a longshoreman

then Section 17.25 of the Longshore Agreement of 1961, provides that only where the employee and employer fails to agree that there is a recourse to the Area Arbitrator. Thus where the Port Committee without providing charges proceeds to try him in absentia without notice, without an opportunity to be heard, without an opportunity to present his defense and presumably on non-existent testimony and then convicts him and imposes punishment, there is presumably unanimous action of the Committee and no further remedy would exist under the grievance-arbitration provisions of the collective bargaining contract. Counsel also pointed out that the sections quoted were in the Longshore Agreement and not the Clerk Agreement and that there is a separate contract for each. It states that it would appear from the Area Arbitrator's letter of February 8th that any effort to have a hearing before the Area Arbitrator is impossible and fruitless and that counsel had only received a letter from the Coast Committee dated the 12th stating the only remedy is for discrimination under Section 13.1 of the supplement of January 31, 1963, and that so far as counsel knew there was no suggestion of discrimination unless there are facts which have been concealed from Law and Law's counsel and counsel wanted to be sure that he had fully exhausted the arbitration-grievance procedure of the contract before resorting to the courts for his client.

Exhibit "D" to the complaint is a letter of February 12th by the defendant Joint Port Labor Relations Committee acknowledging receipt of the February 1, 1965, writing, (Exhibit "A" to the complaint). It states that ILWU is exclusive bargaining agent under the contract and no other person or organization could be recognized under this contract, including the grievance procedure, but that he was entitled to the

guarantees under Section 9 of the NLRA. It states that if he believed that Section 13.1 of the contract had been violated that procedure related to such an alleged violation (discrimination) was set forth in Section 17.4 through 17.31 of the contract (referring to the Longshore Agreement and not the Clerk contract) and enclosing a copy of the January 31, 1963 supplement to the contract for alleged discrimination because of non-union membership.

Exhibit "E" to the complaint is a letter of Law's counsel dated February 18, 1965, to the defendant Joint Port Committee acknowledging receipt of the letter of February 12th. It states that Law was the subject of a complaint arising during his employment by the Matson Terminals as a ship clerk on November 23, 1964, in connection with the S. S. Dant, that he had never received any statement of the complaint nor was he ever given any notice of any hearing nor was he ever permitted to appear before the committee and present his defense but in his absence he was convicted and barred from all employment as punishment. It states that there was no claim of any discrimination as none has ever been suggested. It states that on February 1st counsel sent Law's request for a hearing on the grievance filed by Matson Terminal before the defendant Port Committee in which the action was taken without charges, without notice and without an opportunity to be heard or an opportunity to present a defense and he then asked for the next step in the grievance procedure. Counsel stated he wanted to be sure and exhaust all possible steps in the arbitration-grievance procedure in the collective bargaining agreement before seeking Law's remedy in the courts and that counsel took it from the letter of the 12th that they would not permit Law any further steps in this arbitration-grievance procedure upon the complaint of Matson

Terminal in connection with this incident involving the Dant. This letter also states that unless there are facts that have been concealed from Law and his counsel he does not believe there was any violation of Section 13.1 of the supplement of January 31, 1963. It states that even the Committee of the union who met with Law determined he was not at fault and that the union official Campion had advised him that the union would stand behind him in that matter. That is certainly not discrimination within Section 13.1 of the supplement. This Exhibit "E" to the complaint states that Law's counsel did not think there was any question that in the grievance made by Matson Terminal, the most basic element of fair play is that an employee was entitled to charges, notice, an opportunity to appear and to defend himself before the Committee and to choose who shall and how he shall defend himself and who shall represent himself in such matter and that he should be entitled to exhaust the procedure of arbitration and grievance. Unless counsel heard to the contrary, he would assume the punishment of the Committee in this matter will receive no further hearing nor consideration in any further step in the arbitration procedure under the contract and the sole recourse was to the courts. Copies of this were sent to counsel for PMA, counsel for the union, and the Coast Labor Relations Committee and to the Area Arbitrator Thomas.

These steps in an attempt to use the arbitration-grievance procedure are set forth in full in the complaint and it is therefore alleged that the plaintiff has exhausted all possible remedies under the arbitration-grievance procedure and Law has lost the employment and dispatch and claimed damages of $ 25,000 and in the complaint and for specific relief setting aside this adjudication of guilt in absentia without

notice and without an opportunity to defend himself.

A second count is set forth incorporating the material allegations except the damage clause and then pleads a cause of action for declaratory relief. The plaintiff sets forth that under Section 21 of the Master Agreement he is entitled to a fair hearing and an opportunity to appear and defend himself upon the charges of the defendant Matson Terminal through PMA acting on Matson Terminal's behalf. On the contrary the defendants contend there is no requirement, express or implied, that any employee and particularly the plaintiff have any notice or knowledge of any charge or grievance against him and that he may be tried in absentia and if he is represented at all it is solely by the defendant union who may and do tell plaintiff that he will not be subjected to a grievance or any punishment but who nevertheless in derogation of the statutory collective bargaining agent's duty delegate this duty to the defendant Local 34 who purports to confess the plaintiff guilty of the charges and have him forever barred from employment. The plaintiff contends that the entire collective bargaining agreement is in writing and cannot be changed by secret oral understandings and on the contrary the defendants and each of them contend that the written contracts disclosed under the provisions of Federal law to employees is not binding, but that the secret oral or other understandings between the defendands can and do change the collective bargaining agreement from time to time as circumstances shall please these defendants. The plaintiff also contends he is entitled to the provisions of all the disclosed terms of the collective bargaining agreement, including the arbitration-grievance machinery thereunder, and to have notices of the charges against him and an opportunity to defend and to appear upon these charges by Matson Terminal before the

defendant Committee and that the trial in absentia is void and a nullity. On the other hand the defendants contend the hearing is valid. The complaint appears in the record at pages 1 through 17.

Upon a motion to dismiss the defendant PMA filed the affidavit of Kucin an employee of PMA that attaches the copy of Section 21 of the Master Agreement of Clerks, etc. of 1952 and on page 28 of the record sets forth the minutes of the defendant Port Committee of April 13, 1965, that the complaint of Matson Terminals against Law for failure to carry out instructions and negligence in checking as a hatch clerk on the Dant on November 23, 1964, states that Law was instructed by the supercargo to load 7 conexes destined for Subic Bay in spot 33 right, that 6 were for Yokosuka and not to be loaded but held for another vessel. Subsequently it was discovered that the 6 for Yokosuka along with the 7 destined for Subic Bay were loaded and that it took 1-1/2 hours lost time to correct the error and the employers requested that Law be denied further dispatch. The minutes state:

> "Union stated that Law admitted the complaint was factual. He is not being dispatched. Case closed."

The affidavit of Kucin admits the communication of February 1st signed by the plaintiff and his counsel; admits the communication of February 12th and it sets forth a letter of March 16, 1965, to the plaintiff and a letter of the same date was also sent by the Joint Coast Committee to plaintiff. The letter of March 16, 1965, states that on January 13th the Committee heard the complaint of Matson Terminal concerning the Dant matter and requested that he not be dispatched. It states that the union stated that he had admitted to the Committee that the employer's complaint was factual and that the Committee determined Law should no

longer be dispatched and thereupon the Committee considered the case closed. It states that ILWU is the collective bargaining agent under the contract between ILWU and PMA and that he is entitled to the rights guaranteed under Section 9 of the NLRA. (R. 40). The Coast Committee's letter of March 16th (R. 41) to Mr. Law states the various correspondence had been forwarded to that Committee and it has discretionary authority to consider any matter concerning the operation of the joint dispatching hall or discharges and it states that the Coast Committee has decided not to take jurisdiction concerning Law's matter.

An affidavit was filed by plaintiff's counsel setting forth portions of the St. Sure deposition which was subsequently in evidence in this case. (R. 61-73) It points out the contention of the defendant that the collective bargaining agreement is changed by secret oral understandings not yet reduced to writing and the Port and Coast Committees that exist under the collective bargaining agreement by their practices change the agreement and that arbitration awards are not final but are the subject of subsequent agreements between the defendants. It further appears that the defendant union contends that the Coast Committee has no authority to amend the contracts as contended for by the employers.

The answer of PMA (R. 88-99) alleges that this is an unfair labor practice and therefore within the exclusive jurisdiction of the NLRB. It contends that the defendant Committee is not a legal entity subject to suit although it conducts the dispatching hall. It admits that Law was dispatched as a casual ship clerk until January 13th but alleges that he was not registered. It sets up in Par. XI that the collective bargaining agreement requires all grievances and disputes to be processed under the grievance-arbitration procedure and that the defendant Committee has a duty to

investigate and adjudicate all grievances and only if the employer and union members fail to agree may it go to the next step in the procedure and that a unanimous decision of any of these various steps is final and conclusive and only where it is claimed that there is a violation of Section 13, discrimination, is there any further remedy. It sets forth (R. 93) that the Committee duly "investigated" the grievance of the defendant Matson regarding the plaintiff and because the Committee in this grievance determined him guilty, denied him further dispatch as a ship clerk and it sets forth that Law was given notice of this action denying him his right to make a living. It admits the receipt of the communication of February 1st, Ex. A to the complaint, and it admits the defendant Committee's letter of February 12th, Ex. E to the complaint. It admits that on the basis of the apparent facts therewith no violation of discrimination under Section 13 and the exhaustion of the remedies. The answer of the employers on page 95 admits the contentions of the plaintiff and sets forth that the defendant ILWU is the exclusive representative for collective bargaining purposes of all ship clerks and it contends that the plaintiff received due and proper notice of the charge by the employers giving notice to the defendant ILWU and it contends that the defendant Local 34 fully performed its statutory duty in the absence of the plaintiff and it contends that the hearing in the absence of the plaintiff is valid. It sets up as an affirmative defense that the grievance-arbitration procedure under the contract is binding and that in absence of good faith or discrimination the decision of the defendant Committee is final and binding. It claims there is no cause of action stated. The answer of the defendant ILWU and of defendant Local 34 and of the labor representatives of the Defendant Committee (R. 107-116) is substantially

the same as the issues raised by the defendant employers.

Request for admissions appear in the record, pages 117-122. The responses appear on pages 126-147. Then follows interrogatories and answers to interrogatories and motions connected therewith. Pages 199-204 are a second set of request for admissions going to the address of the plaintiff shown on the W-2 form for the years 1962, 1963 and 1964 showing the plaintiff's last residence at 2231-57th Avenue, Oakland, as it appears this is the record of the defendants and the checks paid to the ship clerks showing Law's address at the same address. The employers admit the W-2 form showing this address.

It should be noticed that the union defendant Local 34 in January before the 13th sent a misaddressed letter to Law which was returned for want of a proper address.

Plaintiff's pretrial statement is in the record at 253-259. The employers pretrial statement is in the record at 260-267. The union's pretrial statement is 268-271, and the pretrial order is page 330-340. It is interesting to note that the plaintiff contends he received no notice, that he met with a union Committee, not the defendant Port Committee on January 13th and received no copy of the charges, had no notice of any hearing of January 13th before the defendant Port Committee and that he had no opportunity to appear and defend himself and that he had been a member of the full time working force since August 1955 following this employment as the sole means of his livelihood (Cl. Tr. 321). Defendant contends that he was a nonregistered or social security man and that this was only a revocable privilege to work through the dispatch hall. That on December 3rd Matson lodged a complaint with the Joint Committee under the collective bargaining agreement and that the union Local 34

attempted to notify the plaintiff of the complaint and sent it to the address shown on the union's records and that the letter was never delivered but returned. The defendants contend that on January 13th the plaintiff appeared at the Local 34 office at the request of that union and he discussed matters with various officials of that union and that he was appraised that charges had been brought and that he did not need additional time. The defendants contend that the Port Committee met and considered the grievance and contend that the plaintiff admitted he made an error and in accordance with its regular procedure it gave no consideration for any excuse and therefore ceased to dispatch him and ceased to permit him to work at his livelihood. (Cl. Tr. 322). Plaintiff's contentions as to damages and declaratory relief appear in the pretrial order, page 323-4, and the plaintiff contends that he had merely discovered a mistake and that the union Local 34 Committee had advised him that he was not at fault and had only discovered a mistake in loading which was immediately corrected and that no blame would attach. Plaintiff contends that his address on 57th Avenue was shown not only by his withholding statements which he provided through the dispatch hall but also his address was shown on the payments by checks to the defendant union for his monthly hiring hall charges and that the union dispatcher had his telephone number at all times and on occasion called him at nights.

The defendants contentions appear on page 325 claiming that the 1952 agreement had been superseded in all regards by the Longshore Agreement of 1961-66. The defendants deny that there is any contract requirement that a copy of the charges should be served upon him and deny that the contract gives him a right to appear in person to defend himself with regard to any grievance. The defendants assert that all

requirements of the contract were satisfied by giving him actual notice on the 13th of January through his exclusive representative, that is ILWU. The defendants contend that their oral understandings and interpretations change the collective bargaining agreement. The defendants claim that the 1/2 hour shortage of pay is not an issue in the case and that taking it up as the customary way was not sufficient but it should be taken up through regular grievance procedure. The defendants deny that Law was advised by the union officials on January 13th that there was no fault on his part (Cl. Tr. 325).

The case was tried before Judge Carter on May 9, 10, and 11 of 1966. A memorandum of judgment was made on August 8, 1967, one year and three months later and appears in Cl. Tr. 345-347 finding that the plaintiff is entitled to no remedy and the defendants to their costs. The formal findings of fact and conclusion of law were filed October 31, 1967, (Cl. Tr. 349-56) and the judgment was filed November 2, 1967 (pg. 359) and the notice of appeal was filed November 13, 1967 (Tr. 362) from the adverse judgment.

STATEMENT OF ISSUES

1. May a man be denied the right to continue his livelihood of 9-1/2 years as a ship clerk by charges of an employer without an opportunity to receive the charges or to appear in the first step of the grievance procedure, before the defendant Port Committee or to present a defense?

   (a) On a grievance by an employer is notice given when the sole notice is that given to a Local 34 and not to the statutory collective bargaining agent, the defendant ILWU?

   (b) Is notice of a grievance to turn upon the contention made many months subsequent that the defendant was handed a

copy of the letter of PMA on January 13th of a hearing on January 13th when no such contention had been forthcoming during the first months thereafter?

(c) May the defendant Local 34 lead the plaintiff employee to believe that they are representing him and that he is not at fault and that no blame will attach and then go into a hearing and confess him guilty and vote for his being forever barred from his employment of more than 9 years?

(d) Is a trial in absentia in which no evidence is given or heard sufficient in compliance with fair play to forever bar a man from working at his livelihood?

2. May the exclusive statutory bargaining agent, the defendant ILWU, delegate its authority to another entity, the defendant Local 34?

3. Is the disclosed written collective bargaining agreement or the secret oral understandings between the defendant PMA and the ILWU and the practices in breach of that contract the collective bargaining agreement?

4. If a collective bargaining agreement required that it be only changed by writing, is this a sufficient demand requiring any subsequent changes or alterations of that contract to be in writing and disclosed to both the employers and the employees working under that agreement?

STATEMENT OF FACTS

This action involves the right of the plaintiff to follow his livelihood and make a living as a ship clerk, an occupation of 9-1/2 years as his sole means of support.

The plaintiff Law worked as a ship clerk from August 1955 until January 23, 1965, and had no other income (Tr. 2). He went to the hiring hall for ship clerks every working day at 7:30 a.m. and signed in for his

dispatch (Tr. 2), although some days he would be dispatched if it were real busy without having to sign in. Sometimes he was dispatched by telephone and the dispatcher kept his telephone number for that purpose (Tr. 3).

Before 8:00 a. m. on November 23, 1964, the plaintiff was dispatched as a ship clerk to Pier 5 at the Naval Base in Oakland to work as a hatch clerk on the Dant (Tr. 3-5). He worked 8 hours quitting at 5:00 p. m. (Tr. 5). His log showed that the whole gang including himself worked from 8:00 to 5:00 that day. His pay check was sent by the defendant PMA for the week's work and he was only paid for 7-1/2 hours for November 23rd (Tr. 5-7). The pay check stub is in evidence, Exhibit 5.

The plaintiff in accordance with the standing practice notified Cleary, the Oakland dispatcher, of the pay shortage and this dispatcher telephoned someone in San Francisco about it (Tr. 8-9). Exhibit 5 carries the red ink mark made by the dispatcher (Tr. 8-9). This is the regular procedure for pay shortage in the Oakland hiring hall.

On January 13th the plaintiff was not dispatched, but the dispatcher Cleary in the hiring hall told Law to go to Local 34 offices at Pier 1-1/2 (Tr. 10-11). The dispatcher is elected by the union members (Tr. 11).

Law went home and put on better clothes and went to the union offices at Pier 1-1/2 on the morning of January 13th. This was a union organization and not the Joint Checker Labor Relations Committee (Tr. 12). Law was called in before the union group at union headquarters for not more than five minutes (Tr. 13). He was told that a complaint had been filed against him by Matson Terminal. It was something about getting cargo in the wrong hold for the wrong ship (Tr. 13).

The union committee asked him how long he had been around and he answered 9-1/2 years. They stated that he had a good record and they

were going to stand behind him in this matter and stated that all people make mistakes, and that was why there are rubbers on pencils (Tr. 14). He was not given any document or writing. He did recognize three parties present as Herman, Campion and Robb (Tr. 14). Herman is the president of the local union. Campion is the business agent and Robb he did not know what his position was in the union (Tr. 15). He did not know the other union persons present although there were 8 or 9 present (Tr. 16). Although he worked the week following, including two days for the defendant Matson Terminal (Tr. 17), it was not until subsequently that he was called into Cleary's office, the dispatcher, and told that they would not give him any more work. He did not find out about any action of the defendant Joint Port Labor Relations Committee until told that by his attorney (Tr. 16). As soon as he could see his attorney after Cleary told him he wasn't going to be dispatched, either that day or the next day, he went to see his counsel and the letter of February 1st was signed and sent (Tr. 18-19).

Law having lost his livelihood (Tr. 25) tried to get employment in a trucking concern, a steel company, etc., but he was told he was too old for such jobs (Tr. 29). He did heavy labor working out of the teamsters hall, but he hurt himself by pulling muscles (Tr. 26). He did get some work at a used car dealer as a roustabout wiping automobiles, changing tires, servicing automobiles (Tr. 26-27). He did two weeks of work as a relief salesman at the automobile firm (Tr. 27). He has trouble with calcium in his shoulder and he has had to draw State unemployment insurance (Tr. 27-8).

The incident on November 23rd involved loading a ship at Pier 5 (Tr. 28). Alternating between household goods in large containers, conexes,and smaller cargo. He was working with a lift driver who moved

the cargo to the point where the hook loads the boat (Tr. 29). It was on the far end of the dock (Tr. 30) and the miscellaneous cargo with the small boxes called "plunder". Law's immediate supervisor on the job was a Mr. Harvey who gave him his log and started him out. Later in the day Harvey came to him and told him to take a conex out of section 33 and then go back and finish 6, first. He did not give any directions to load any particular item (Tr. 31). The longshoreman running the lift truck complained he had been going up and down the dock like a maniac and said he would take that stuff and that the hook was hanging (Tr. 31-2). The clerk's duty is to sign the tags of the cargo loaded. He proceeded to sign the tags (Tr. 33), and he noticed that some of these tags were marked Subic Bay or some other name he thought was a Japanese port. When he went to sign the tags he discovered there was an error in loading (Tr. 34) and he immediately went to Harvey and asked if the ports were the same. He was told that they were not and so this cargo was removed (Tr. 35).

The union, Local 34, received PMA's letter of December 3, 1964, that initiated the charges against Mr. Law on behalf of the defendant Matson Terminal. There is no contention that this complaint or charge or grievance was ever delivered to the defendant ILWU, the exclusive collective bargaining representative of the employees. More than one month passed and it was not until January 6, 1965, that the Ship Clerks Association (def. Local 34) sent him a letter addressed to 3945 Delmont, a place he had only lived a few months in 1962 (Tr. 36). He did not receive this letter of Local 34, dated January 6th, as it was misaddressed and returned to the sender. There is no issue that no written communication was ever mailed to the plaintiff Law by anyone concerning this complaint of this employer Matson Terminal.

Mr. Law provided his address of 2231-57th Avenue, Oakland, to the Port Relations Committee that ran the hiring hall (Tr. 37). He did this for his W-2 forms for the years 1962, 1963 and 1964 (Tr. 37) and this is in evidence as plaintiff's Ex. 14.

Law during this period of time from 1962 through 1965 made payments of money to the ship clerks for the hiring hall charges mostly by checks each of which bore the address 2231-57th Avenue (Tr. 39).

Not only did he provide the dispatcher with his address on 57th Avenue but he also provided his home telephone number as that is necessary for dispatches by telephone (Tr. 39-40). Law was at the hiring hall every working day except Saturday, Sunday and holidays such as Christmas (Tr. 41). The first notice that there was any employer complaint against him in his 9-1/2 years of service was when Cleary, the dispatcher, told him on January 13, 1965, that he was to go to the union office at Pier 1-1/2 (Tr. 41-3).

On cross examination Law testified that he worked out of the teamsters hall after his refusal of further dispatch as a ship clerk during 1965 earning about $600.00 (Tr. 45) and that he earned about $200.00 from Jory Motors. During 1966 up to the time of trial he earned about $750.00 (Tr. 46). He was capable of doing regular work as a ship clerk but not heavy physical work he had tried to do because of the calcium condition in his shoulder and the doctor advised him not to try it any more (Tr. 46).

James Herman, president of defendant Local 34, was called as an adverse witness and testified that he was present at the meeting of January 13th at the union hall (Tr. 87) and that he was also a member of the Joint Port Labor Relations Committee that consists of members

selected by PMA and that the other members of that committee were representatives of defendant Local 34. Local 34 administers the contract locally (Tr. 88) and on January 13th the union members of the Committee were the witness, Campion, Gil Martin, Robb, and Dorsey. The Committee acts by a composite vote of the ship clerks association union members on one side and the employer members on the other. The employer members were Abbey, Domingo, Shepard, Littlefair and Kucin. The Port Committee meeting was called on January 13th at 10:30 a.m. (Tr. 89). His local union received Exhibit 12-A, the letter of December 3rd charging Law. This was received on December 4th (Tr. 89). The office girl in the local union office made a xerox copy of that letter and Exhibit 12 dated January 6th is a letter sent to Law but not received by him. The month delay between December 4th and January 6th was because no meeting was scheduled for the Joint Port Labor Relations Committee until January 13th (Tr. 90). No actual charge of the complaint was sent to the union Commitee (Tr. 90), only the letter of December 3rd which is in effect a citation (Tr. 91). On the letter is marked "Agreed Law not dispatched - 1-13-65" which was placed by some girl in the union office (Tr. 92). Under it is written "Okay NTG 1-21-65" which means that this was read to the regular union membership meeting of Local 34 on January 21st. (Tr. 92). The letter of January 6th to Mr. Law was returned to the union because it was not his proper address (Tr. 93). This letter came back to the union on January 8th and no attempt was made to contact Mr. Law until the 13th (Tr. 93). One of the girls in the union office notified Mr. Cleary to send Law over on the 13th (Tr. 94), when he appeared at the union headquarters at Pier 1-1/2. That was the union Committee.

Herman testified (Tr. 95) that Law was ten or fifteen minutes in the

presence of the Committee and that Mr. Herman handed him a xeroxed copy of Ex. 12-A and testified that he asked Law if Law wanted a delay in the hearing so he could familarize himself with the facts and Law declined the offer of a delay. Herman was asked about the provisions under the new clerk's contract as to discipline administered by the union, Section 17.81 which reads:

> "All clerks shall perform their work conscientiously and with sobriety and with due regard to their own interests shall not disregard the interests of the employer. Any employee who is guilty of deliberate bad conduct in connection with his work as a clerk or through illegal stoppage of work shall cause the delay of any vessel shall be fined, suspended, or for deliberate repeated offense, cancelled from registration. Any employer may file with the Union a complaint against any member of the Union and the Union shall act thereon and notify the Joint Port Labor Relations Committee of its decision within fifteen (15) days from the date of receipt of the complaint. An employer shall not be required to appear nor need he participate in discipline by the Union of its members beyond the filing of complaints." (R. 96-97)

Herman testified this would only apply to members of Local 34. The court specifically asked Herman if he understood that there was a distinction, the union only taking disciplinary action against members of the union as such and Herman answered that there were just different types of registration and union membership and that Law not being an A registered man would not come under Section 17 of the current contract. Union counsel stated that this portion of the contract does not apply to Mr. Law who is not a union member (Tr. 99). Herman testified that when the union acted under that Section 17.81, it did by the Committee before whom Mr. Law appeared (Tr. 100). Herman contends that Law indicated that the charges of the employers were accurate, and told Law that there would be a meeting of the Port Committee at 1:30 that afternoon and the union committee would report to the employers precisely what he had told them that morning (Tr. 100).

Herman testified (Tr. 102) that the Port Committee may only act with the union's concurrence, but this does not foreclose the other party from going to the next step of the grievance procedure; that if the union votes in favor of the working man, it would have to go to arbitration at the request of the employers but if the union declines to vote it doesn't mean that there is a stalemate, but the employer may exercise his objection to move the matter to the next step of the grievance procedure. Herman could not answer how many employer complaints against clerks had gone to the next higher step nor could he state for the last year, 1965, but he knew that some had gone to arbitration (Tr. 103-4). Herman admitted that he would present Mr. Law's viewpoint to the Port Committee and said something about Law dropping papers being an extenuating circumstance (Tr. 104-5). There was no chairman of the Port Committee, Kucin acting for the employers and Herman acting for the union (Tr. 106). Herman testified (Tr. 107) that he was the one who stated Law admitted the complaint was factual. He testified no one said "he is not being dispatched" (Tr. 108). There was no necessity of a vote as both the employers and the union were in agreement that Law was barred from further dispatch (Tr. 109). Herman admitted that he had access to the PMA records including the W-2 records showing the plaintiff's address (Tr. 113). In addition, the union maintains records of addresses that are supplied through the dispatch hall (Tr. 114). Herman testified that those against whom charges are filed by employers do not appear before the Joint Committee (Tr. 118). The Local 34 represents them at the Port Committee meetings (Tr. 118). Herman testified that he had never seen the letter of February 12, 1964, before, and that Kucin although an employer's representative acts on behalf of the entire committee on such matters (Tr. 119).

Gilmartin testified that he was an employee member of the defendant Joint Port Labor Relations Committee (Tr. 134) and was also a member of the union committee that met at Pier 1-1/2 on January 13th (Tr. 135). He called Mr. Law into the inner office (Tr. 135) and it was the secretary Campion who read the charges (Tr. 136). He testified Herman gave him a copy and said, "Do you want a little time to read this matter over" and Law answered, "No" (Tr. 136). The witness was asked whether Law had told them his supervisor had told him to move a container first and implied that he should come back and move the others into the hold (Tr. 136-7) to which the witness answered not exactly to those words, he said he had some trouble and it was near quitting time and the papers blew away and there was some kind of a muddle there. This witness said that Law made no mention of going to his supervisor to correct the mistake that he had discovered. The witness could not remember what was said at the defendant Joint Port Committee between the employers' representatives and the union representatives (Tr. 140) but the minutes, Ex. 13, reflect the meeting. He did remember that about Law he was dissatisfied with it and he wanted a rule to go in there that he (Law) was finished as far as the waterfront was concerned (Tr. 141). He testified that the union did not vote that Law be punished by being barred from further dispatch (Tr. 142). He testified that none of the union members voted and only the employer members voted (Tr. 142). He testified that Herman was the spokesman for the union members.

Mr. Gilmartin when asked about the next man shown in the minutes, a Mr. Urdahl, that the union disagreed on the charges that he had been drinking alcohol at the Matson Terminal and the union stated that they would only consider a complaint in which their opinion dealt with a

contract violation. He testified that the man referred to was "a book member" and he is handled all together different. He is handled through the grievance committee and not through the Labor Relations Committee (Tr. 143, lines 22 to 25).

Mr. Gilmartin testified (Tr. 144) that "book members" are tried by the union grievance committee. Page 144, lines 6 to 8:

> "Q. Mr. Urdahl is a book man because he has a registration number, isn't that it?
> A. Yes.
> Q. And with him the union refused to do anything, so there is no punishment administered?
> A. I don't know what it says.
> Q. You read it and tell me if there is any punishment in his case.
> The Court: I think we are beginning to get astray on this colloquy."

Whereupon the court barred plaintiff from making any further inquiry as to this "book man" or his matter.

On the waterfront, a man who is a member of the defendant union ILWU and one of its locals is a registered man, and has the particular status which appears in this record. Indeed the Master Agreement of 1952 specifically spells out that a person can only be registered by the joint consent of both the employers and the union and of course unless a man has been admitted to full book status, he does not have the status of "registration".

Gilmartin testified on cross examination (Tr. 146) that he was a ship clerk for the past thirty years and elected a member of Local 34 as one of the five members of their labor relations committee (Tr. 147). He only attends the committee meetings but does not handle any of the communications and the union secretary does this for the union.

Mr. Campion was called as a witness and testified (Tr. 149) and he was a member of this Joint Port Labor Relations Committee and that he

was the union business agent (Tr. 150). There are five union members of the Committee elected by the union membership. The Committee normally meets once a month. He was the secretary for the union labor relations committee (Tr. 151) and he received Exhibit 12, the PMA complaint on behalf of the defendant Matson Terminal on December 4, 1964 (Tr. 151). There was over a month's delay before the union sent its letter of January 6th to Mr. Law, which letter was never delivered for want of a proper address (Tr. 152) and it is normal for the business agent or somebody that is a full time employee of the union to go out to the place of the employer and find out what the complaint is about (Tr. 152-3). He believed this was done by Herman (Tr. 153).

Campion testified that where there is a pay shortage of say 7-1/2 hours being paid instead of 8 hours, it may be taken up either directly with him as business agent or through the dispatcher (Tr. 153-4). Law's shortage was not reported to him (Tr. 154), and the dispatcher could take it up directly with the employer by telephone (Tr. 154-5).

Campion testified (Tr. 157) that at the union meeting of the committee on January 13th, Law came to the union offices and Campion told him of a complaint from PMA (Tr. 157). He testified that after he had read the complaint Herman gave Law a copy. Asked if Law had stated that the supervisor had told him to move certain cargo first and then come back and move the rest of the items, he said he could not remember specifically. He can remember Law saying that he was quite rushed in that some of his papers had been dropped and he found that the cargo had been sent to the wrong port and then he immediately contacted his supervisor to rectify this mistake (Tr. 158).

Campion (Tr. 159) when asked whether he had told Law at the union

Committee meeting that he understood mistakes could happen and that is why they have erasers on pencils, replied that he did not remember whether he said it, although he might have said it as we all know that mistakes do happen. He did admit that the union and the Committee had stated they would intercede on behalf of Law with the employers. Campion (Tr. 159) testified that when he went to the meeting with the employers he left Law with the idea that he, Campion, and the other members of the union Committee were going to represent him and protect him before the Committee that included the employers. Campion testified that the minutes, Ex. 13 at page 6 of the defendant Port Committee, truly reflected what took place (Tr. 159).

Plaintiff's counsel read to Mr. Campion a portion of the defendant Port Committee's minutes, Ex. 13, (Tr. 160), that the employers suggest that since he is not a registered clerk he be denied further dispatch at the dispatch hall. Campion testified that that was not a remark but the determination of the Committee. It should be interesting to note that a "book man", that is a member of Local 34 of the union, is a registered clerk and therefore this punishment of denying further employment was administered to Mr. Law for this reason and this is the particular language in the minutes that as he was not "registered". Campion testified that the union members did not caucus on Law's matter (Tr. 161) and Campion testified that he voted at neither of the two meetings (Tr. 161).

It is interesting to note at page 163 of the transcript that the trial judge states:

> "As I understand it, there is a different procedure for men who have different union status as far as the union is concerned."

This obviously sums just what happened to Mr. Law in this particular

matter. He was not a member of the union, and the union was therefore not interested in him or presenting his matter.

Notwithstanding the testimony of Mr. Campion on direct examination that if the union did not agree to the punishment of Mr. Law, it would then be up to the employers if they wished to take it to the next step, and that the Committee must act unanimously, one vote by the employer and one vote by the employee. Yet on cross examination Mr. Campion testified that the union could have taken it to the next step of the grievance procedure which was arbitration (Tr. 165). This is notwithstanding the direct language of the Master Agreement of 1952 and not the subsequent new agreement made about the time of this trial, and some two years after the action was filed, that only where the employer and the union failed to agree, may the matter go to the next step at the instance of the party seeking a remedy. Without a concurrence of both employers and union members, there would not be action of this committee and thus mere failure to act by the union would have left Law without any punishment and with the employers required to take it to arbitration or the Coast Committee if they deemed such a step proper.

Mr. Campion also testified (Tr. 166) that a different rule was applied to non-union, called "social security men" in that they did not accept excuses from them and this practice goes back prior to 1954.

On page 171 when Mr. Campion was being pressed for what would happen if the employee members refused to vote punishment against an employee charged with a grievance by an employer, he stated that a social security man would not be dispatched, but a union member would be dispatched. At this, the court observed that he understood it you have a different status and difference in dispatch depending on this matter of

membership. Again on page 172 in the colloquy between court and plaintiff's counsel, the witness Campion testified that as to social security men, that is men who are not union members, they are not dispatched even if the employee members do not vote punishment. Campion testified that the general difference was that as to a registered man when a citation comes in before the employer, it goes before the union committee. If he is found guilty a certain punishment is assessed by the union against its own member. This is then reported to the employer and if he agrees with the punishment which the union has cited, then that is the end of the case. However, the employer has a right to disagree, and can take it to arbitration and ask for further punishment. Under the contract the union does not discipline nonmembers (Tr. 172-3).

Mr. Campion testified at page 175, that the Master Agreement of 1952, Ex. 1, was used as the basic contract for a good number of years. They are now using a clerk's agreement known as the 1961 to 1966. When asked when he first saw a copy of this second contract, he testified that it was only within the last few months (Tr. 176), but all of these matters were negotiated through the years of 1961 on. It appears on page 177 that there was a stipulation that the second agreement known as the 1961-66 agreement was signed in August 1965, Ex. 2 in evidence (Tr. 177).

Robb testified (Tr. 180) that he was a member of the committee that is one of the defendants to the suit and also a member of Local 34, ILWU Committee that met on January 13th (Tr. 181) and that there were five or six present at that committee meeting. When the union Committee gets a complaint somebody usually is sent out to investigate it (Tr. 182); but he does not know who investigated the Law matter. Mr. Robb testified (Tr. 183) that he had known Mr. Law and had worked with

him quite a bit in the Port of Oakland as the witness had been a ship clerk since 1950. Mr. Law was being dispatched from the Oakland hall (Tr. 184). At this meeting, Mr. Campion told Law that there was a charge or grievance filed against him involving the Dant. When asked whether Law had stated that Harvey had told him to move certain items and then come back and move others, the witness said that Law gave his impression of the charges but he couldn't quote anybody verbatim at this time (Tr. 185). He testified (Tr. 186):

> "A. Well Mr. Law at the time stated exactly what he had had happen, and basically this is what he was trying to do was to follow the instructions of his supervisor and got confused somewhere along the line."

He testified that as a result some conexes or boxes got in the wrong hold and that when Law found this out he went to his supervisor and asked him if this was the right port. Mr. Robb testified (Tr. 187):

> "A. I believe Mr. Herman said that we would present his facts to the employers and the extenuating circumstances and it would be good for him."

On page 190 the testimony was:

> "Q. Now in this particular case there was a grievance filed by Matson Terminal, and that would of course, necessarily come before the Joint Committee wouldn't it?
>
> A. In the case of a social security clerk, yes.
> Q. Now if he weren't a social security clerk it would just end, then, with your union committee; isn't that it?
> A. A grievance --
> Mr. Leonard: Objected to on the grounds it is immaterial how matters involving other classes of employees are handled.
> The Court: For purposes of making the distinction, I will have to overrule that objection. Just briefly, what he is trying to do is to make a distinction between a social security man on the one hand and a union man on the other as to how the complaints against them are handled.
> The Witness: If a complaint is filed against a union member, it goes to our grievance committee. It is processed by the grievance committee. The findings are then passed on to the Labor Relations Committee who reports it to the Joint Labor Relations Committee.

"Mr. Crittenden: Now as to the man that is not a union member, that goes directly to the Joint Committee, is that correct?
A. Well it comes directly to the union Labor Relations. We bring it to the Joint Labor Relations Committee and process it from there."

Robb testified (Tr. 191 that the union committee determined that they would go in and fight Mr. Law's battle for him with the employers. Among the union members of the Port Committee, their action is on a majority rule basis (Tr. 193). The Labor union members when Law was present decided, "They would go to bat for him", and promised they would help him on the employers' grievance. This was their promise (Tr. 194). Herman was the spokesman at the Port Committee meeting and that Law admitted the complaint was factual (Tr. 195). There was no vote taken at the Port Committee (Tr. 196).

Robb testified (Tr. 197) that he had known Law for a number of years and had worked with him at the Port of Oakland; he could not remember anything about Law's abilities or work and assumed that he was conscientious. He testified (Tr. 199):

"Q. Mr. Robb, aren't there instances before the Joint Labor Relations Committee where the employee members refuse to go along with punishment and the matter just stops right there, the employers insisting on punishment?
A. The way this is set up, if we refuse to agree with the employers or the employers refuse to agree with us on our complaint, the spokesman that states he will take this to the next step of the grievance machinery. Now, this is the way it works at all times.
Q. Do you know of any case where there has been a disagreement and the matter has just dropped there without going to arbitration?
A. These cases, sometimes the employer or union if there is disagreement reached and it is stated that it goes to the next step of grievance machinery, maybe a man is late or something like that. I doubt very much -- and maybe he disagreed or something like this. I don't think the employer would spend $100 to slap the man on the wrist for this.
The Court: What do you mean, that they would not then proceed, withdraw their complaint or what?

The Witness: We have stated the case and disagreement is reached, and if the employers desire to take this on further, they will then call for arbitration.
The Court: You will call for arbitration?
The Witness: Well, the employer will call if they are filing the complaint against our member, but it depends entirely upon the case itself, such as smoking or a minor difficulty, and the employers won't press this. It costs both sides quite a bit of money to arbitrate."

Mr. Kucin testified (Tr. 206) that he was a member of the Joint Port Labor Relations Committee and had been a member since 1954. He was an employee of the defendant PMA. There are two dispatch or hiring halls (Tr. 212) and when an employer wants a ship clerk, he notifies the hall who dispatches a man to work under the collective bargaining agreement for that employer (Tr. 213). A registered man (that is one who is a union book member) is dispatched for as long as the job may last. If he is nonregistered (that is not a member of Local 34), he is dispatched for one day only. (Tr. 213). Permanent or monthly clerks are not dispatched but work for the company on a monthly basis (Tr. 214). No notice of the charges were sent Mr. Law by the defendant Joint Port Labor Relations Committee (Tr. 214). Neither was a notice of the hearing of January 13th sent to Mr. Law (Tr. 214). The PMA letter (Ex. 12-A) which was the complaint or charge of the employer Matson Terminal was addressed to Local 34, the ship clerk's association. The particular complaint against Law was numbered 21-64 (Tr. 217). At the meeting Mr. Kucin read the complaint since it is an employer complaint and asked the union for a reply (Tr. 217). Herman spoke for the union's side. The reply was that Law was guilty and there were some extenuating circumstances but he did not recall the details (Tr. 218). There was no vote taken because the union reported the man guilty (Tr. 218). Since he was a nonregistered man called a social security man (that is

one who is not a member of the union) it is normal procedure that his services be terminated (Tr. 219). No notice of the action was sent to Mr. Law (Tr. 219), but the witness believed he talked to the dispatcher sometime the following week (Tr. 219).

Mr. Kucin testified (Tr. 220) that whatever information such as the address of Mr. Law in the W-2 forms for the years 1962, 1963 and 1964 were available to the members of the Joint Port Labor Relations Committee, and to all of the other persons on that Committee (Tr. 220). They merely had to look at the PMA record section for that information (Tr. 220).

Mr. Kucin testified that Ex. 2, the new clerk's contract was distributed sometime in 1965 (Tr. 221). This contract was put into its present form and the agreed language sometime in 1965 (Tr. 222), and the distribution made to the employer members sometime in the summer of 1965, probably in August (Tr. 222). Kucin testified that when there is not agreement at the port level, the matter may be dropped by the side bringing the grievance, or it may go to arbitration at the request of the complainant (Tr. 229-31). If it went to arbitration, it would go to the Area Arbitrator and there were instances where the employer did not get an agreement and the matter was terminated. There were very few instances where the employers complaint resulted in dismissal of the employee (Tr. 231). There is a different rule applicable as to those who are registered and those who are not registered (Tr. 231). Kucin testified (Tr. 242) that a representative of Matson Terminal was sitting on the Committee side with him, and had any of the extenuating circumstances been acceptable he would have so advised, but he did not. They did not hear Law's side of the story, only the statement by the union that he

was guilty as charged (Tr. 243).

Exhibit 3 contains the 1963 deposition of Paul St. Sure showing the contention of the defendants as to the various written contracts and that there was in the process of negotiation another contract, which is evidently this agreement Ex. 2 signed in August of 1965.

ARGUMENT

The procedure requires that there be a minimum of fair play of at least knowledge of the charges, notice of the hearing and an opportunity to appear and defend.

At no time was the plaintiff Law given any notice of any hearing before the defendant Joint Port Labor Relations Committee. At no time was he given an opportunity to appear and present his side. The first knowledge he had that charges were made against him by an employer was on the morning of January 13th when the dispatcher told him to go to the union headquarters in San Francisco. That was the day he was tried in absentia by the statement of the union official Herman to the Joint Committee in his absence that the allegations were factual, that is he Law was guilty.

This was the first step in the grievance procedure.

The Master Agreement for Clerks, etc. (Ex. 1) provides in Section 21 for the grievance machinery. It provides that there shall be immediately established and maintained during the life of the agreement a Port Labor Relations Committee for each port affected by this agreement, and a Coast Labor Relations Committee at San Francisco, California, and each of such Labor Relations Committee are to be comprised of representatives by the union and representatives designated by the employer. The agreement provides that it shall act by one vote of the employers and

one vote of the union. Subparagraph 3 of Section 2 provides that grievances arising on the job shall be processed first between the dock stewart and management and if it is not settled, then it shall be referred for determination to the union official and to such representative of the employer as the latter may designate and the subdivision (c) of subparagraph 3 provides that if the grievance is not settled in steps (a) or (b) above, it shall be referred to the Port Labor Relations Committee. Subparagraph 4 provides that the Port Labor Relations Committee shall adjudicate all disputes arising under the agreement including grievances under subparagraph 3. Only in the event the employer and the union members of any Port Labor Relations Committee fail to agree upon any question before it, can such matter be immediately referred at the request of either party to the Area Arbitrator for hearing and decision, and the decision of the Area Arbitrator is then subject to further provisions. Subparagraph 5 provides that should there be a failure on the part of either party to participate in any of the steps of the grievance machinery, the matter shall automatically move to the next higher level. In any case where the Area Arbitrator makes a determination, subparagraph 7 provides that either party may immediately have this referred to the Coast Labor Relations Committee and if the Coast Labor Relations Committee cannot agree, it shall be referred to the Coast Arbitrator who shall have power and duty to set aside the decision found in conflict with the agreement.

If we can believe the labor members all of whom were called as adverse witnesses, there was never a vote by them that any punishment be administered to Law, and therefore there has been a breach of this agreement.

In any event, the initial and first step in the grievance of the

Matson Terminals against Law was commenced by a form provided by PMA to be completed and which was completed and forwarded to PMA. PMA on behalf of its employer wrote the letter of December 3rd not to Law and not to the exclusive bargaining agent for the employees, the defendant ILWU, but to the defendant Local 34 who proceeded to sleep upon the letter for one month and several days when some secretary in that local union's office wrote a letter, Ex. 12 in evidence, and sent it to an address in which Law had lived but several months early in 1962, and not to his regular address on 57th Avenue in Oakland. This letter was returned in the course of several days undelivered to the defendant Local Union No. 34. Notwithstanding there were still several days before the next Port Committee meeting, this union waited until the morning of January 13th when they had their elected dispatcher at the Oakland dispatch hall, Cleary, tell Mr. Law to go to the union headquarters over some employer complaint. Law went to the union headquarters in San Francisco, Pier 1-1/2, and had a short meeting with the union Committee of some half dozen or more persons. Both Law and several members of this Committee were of the opinion that Law expected the union to, and the union promised to put up a contest for Mr. Law.

Instead, Mr. Herman, the president of Local 34, went into the meeting of the Joint Port Labor RelationsCommittee and proceeded to not only vote Mr. Law guilty and confess him guilty, but also to impose the punishment of barring him from making his livelihood by preventing further dispatch from the hiring hall.

We do not believe that the District Court is required on such a proceedings to go into the merits and retry the case of the employers' complaint against Mr. Law. It need only inquire as to whether the contract

was followed and performed and if the plaintiff Law was afforded a semblance of fair play and due process in the loss of his job and livelihood and if this conviction by this Committee barring Law from his permanent occupation should be annulled or set aside and damages granted for breach of the contract. Instead the court went ahead and attempted to make findings that Law was guilty of negligence and refusal to obey orders and to find that although no notice was ever given nor was any appearance ever had before the defendant Port Committee, by Mr. Law or that he was afforded an opportunity to present a defense before the defendant Port Committee, the court undertook to believe some of the union officials that Law had told them he was guilty as charged and find that this defendant local union acted in good faith in the performance of the duty of the exclusive bargaining agent (which it was not).

The facts are without dispute that the first knowledge Law had of any complaint, charge or grievance against him by any employer was on the morning of January 13, 1965, when he was notified by the Oakland dispatcher that he was to go to the union offices in San Francisco. He went to this union meeting that day and was there told that there was some kind of charges against him by Matson Terminal in connection with the S. S. Dant loading. His knowledge and belief is set forth in his communication of February 1, 1965, to the defendant Port Committee, to the Area Arbitrator, the Coast Labor Relations Committee and the Area Labor Relations Committee, attached as Exhibit "A" to the complaint. The correspondence that followed are set forth in the Exhibits "B", "C", and "D" to the complaint (all of which are admitted and not in issue). There were two further letters, one of March 16, 1965, by the defendant Port Committee, which appears on page 40 of the clerk's transcript and

another of the same date by the Coast Committee (Cl. Tr. 41) both of which are in evidence. At this stage of the proceedings, there was no contention that any copy of any PMA letter constituting a charge was ever delivered to Mr. Law. Indeed it was never contended that this was even given to or sent to the statutory collective bargaining agent, the defendant ILWU, but the only contention is that it was sent to another entity, Local 34. There is no contention that Law was ever given any knowledge or notice of this proceedings prior to the 13th day of January when the defendant Port Committee met and adjudicated him guilty in his absence. There is no contention that Mr. Law was told or informed that he could appear to defend himself or to present any matter in his defense. He was led to believe, and there is no issue on this, that the union, Local 34, intended to defend him and to protect him. Consequently, it would be impossible for the Port Committee without the concurrence of its union members to act adversely to Mr. Law.

The first essence of any proceedings such as a grievance, requires that the accused employee would at least have an opportunity to have the particular charges set forth with particularity, and to be given a notice as to when and where there will be a presentation of the matter, and an opportunity to hear the evidence against him, to rebut it, test it by examination, and to present his defense. Even the testimony of the defendant union members of this defendant Port Committee was that they were very vague as to just what the matter was and what Mr. Law's defense was or even what they called "extenuating circumstances" being something about some papers flying loose and he being harrassed. Construing of the testimony most favorable to the defendant, we do not even have the barest semblance of any hearing or of any representation

or of any defense. Instead we have testimony of these union employee representatives on the Port Committee that they assured Mr. Law that they would defend and protect him in a committee (if it reached there) where unanimity of both employer and employees was necessary for any consequences to flow from it detrimental to Law. Instead we find that he is pled guilty and forever barred from his livelihood of more than 9 years.

Mr. Law stands convicted and barred from his livelihood on charges tried in absentia, upon contentions that on January 13th he received a copy of a letter which he did not receive, but which is clearly shown to have been a returned letter upon a finding that he received a xeroxed copy on January 13th at the union committee when there was no contention at any time in the first months after January of 1965 that he had been given such a copy. Handing a man such a paper on the very day of the Port Committee meeting, is hardly a notice even if it were delivered. It is interesting to note that none of the defendants' answers nor their contentions in the pretrial order contend that any such notice or writing was handed him on January 13th and that this appeared only in the answers to interrogatories filed long after the early part of 1965.

There is no issue that the members of Local 34 who were part of this defendant Port Committee and also members of the defendant Local's Committee with whom Law met represented to him that they would fight his battle if it came before the Port Committee, who must have concurrence of the employee members in order to act. This would lead any person and it did lead Law to believe that in the initial stage of the grievance, that nothing adverse could occur. This is certainly a strong showing that he was not in this initial stage required to do anything.

This leads us to the next question. May this defendant Local 34

members of the defendant Joint Port Committee and members of that local union's committee who met with Mr. Law on January 13th lead him to believe that they would represent him and defend him from the employers' charge, and then go into the hearing on that same day and where joint action of both parties is necessary, confess him guilty when he was not, and vote for his being forever barred from his employment of more than 9 years? The obvious answer is that if this Local 34 were the collective bargaining representative, they had no authority or right to make the representations as shown in the record and then to confess him guilty and acquiese his being barred from his employment of more than 9 years.

It was obviously a trial in absentia before the defendant Port Committee. It was certainly extrinsic fraud, if he were in fact told that there was to be a meeting that day to lead him to believe that the necessary employee half of the Committee was to protect him when it did not. This is clearly grounds in the concept of fair play to give rise to the defense of extrinsic fraud which if he had known of the meeting of either 10:30 or 1:30 on January 13th (and the evidence is conflicting on the hour of this Port Committee) and the testimony is conflicting as to whether he was told there was to be a meeting that day of January 13th of the Port Committee or indeed if there were to be any meeting at all. This is no notice required as a minimum of fair play or due process or of any grievance procedure.

In any event the trial was in absentia and in which no evidence was given or heard and in which the union defendant Committee member Herman stated the accused was guilty (the charge is factual) while the other members sat by in silence and acquiesed in forever barring him from his sole employment of over 9 years and under the agreement

from any further steps in the grievance procedure in effect at the time of the alleged incident.

The contract in effect at the time of the November 1964 incident and at the time of the January 13th proceedings is Ex. 1, the Master Agreement etc., of 1952. In 1963 the deposition of Paul St. Sure was taken in the Alexander case, No. 40935, and is in evidence in this case as Ex. 3. Mr. St. Sure was then president of PMA and he testified on the first several pages of his deposition that the "Pacific Coast Longshore and Clerk's Agreement" was then in its first draft and in the course of preparation in an endeavor to codify the prior agreements, understandings, rulings and awards on both the longshoremen and clerks but that the language was not yet agreed upon except so far as the longshore portion was concerned that the writing covering clerks was the Master Agreement of 1952 but that only portions were in effect although the agreement provided that it could only be changed or modified by writing. On page 25 of that deposition, lines 14 through 27, he testified that the Coast Committee signed minutes were used to interpret, clarify, modify, or amend the basic written contract (that is a creature of and a committee created by and existing under the agreement could change the contract: the tail could wag the dog, so to speak). He also testified that when an idea or agreement had been orally reached, it was a part of the contract even though it was not reduced to writing, although they prefer to reduce it to writing.

Mr. St. Sure on his deposition testified at page 60, lines 24 to page 62, line 21, that the exhibit marked 39 attached to that deposition, a supplementary agreement dated February 28, 1962, in Section 9.11 of that exhibit referred to two agreements then in effect and being

changed by that writing, to wit, the Pacific Longshore Coast Agreement and the Pacific Coast Master Agreement for Clerks and Checkers (Ex. 1 in this case). Consequently, as of February 1962 there was then recognized in effect the Pacific Coast Master Agreement by written agreement between the negotiating parties but Mr. St. Sure pointed out that over the past ten years (prior to 1963) that there was historically two agreements on separate pieces of paper one of which covered clerks and that the mechanical job of getting them together in one volume had been in process over ten years.

Mr. St. Sure testified on his deposition, page 67, lines 6 to page 69, line 23 that the June 1962 written supplement purported to amend a portion of the Coast Longshore agreement and the appropriate section of the Clerk's Master Agreement. Mr. St. Sure explained again that they were separate pieces of paper but that they had not yet gotten into a single form as a matter of draftsmanship and that the agreement includes some twenty-three arbitration awards but that these are a matter of mere tabulation in the agreement and that these awards are not final but still something that are the subject of mutual agreement between the parties who modify it by that power.

On page 106, lines 11 to page 107, line 11 of the St. Sure deposition, Mr. St. Sure was asked about the Area Committee and he testified that as only to the longshoremen was there an AreaCommittee but that on the clerk's side there is only the local and the Coast committees.

In the deposition, page 161, line 1 to 162 line 7, Mr. St. Sure referred to Exhibit 21 in that deposition dated June 1962 which provided for insertion in the Clerk's Master Agreement of certain provisions. Again Mr. St. Sure pointed out that they were separate documents as

to the longshore and clerk contracts and that as of June 1962 there were two sets of documents, one of which was the Master Agreement for Clerks. This matter of the contention that this Clerk's Agreement was changed by custom, practice and these oral understandings not reduced to writing will be discussed later in this brief.

Ex. 2 is the new clerk's agreement purporting to cover the period 1961-66, however, the evidence and the stipulation shows that it was not signed until August 1965 nor was it in writing or circulated to either the employers or the employees until either late summer or fall of 1965, sometime after the matters involved in this proceedings.

Although this document of 1961-66 for the clerks, Ex. 2 in evidence, was not signed until August of 1965, it was the defendants' position that these sections of the 1961-66 agreement, Ex. 2, had been in effect for some period prior to the signing of the agreement, although they do not appear in any clerk's written agreement or supplement up to the time of the signing of Ex. 2 in August of 1965.

Ex. 2 (that was signed in August 1965, and not distributed prior thereto) provides on page 36, Sec. 17.11, that the parties shall establish and maintain Joint Port Labor Relations Committee for each port and a Joint Coast Labor Relations Committee and each of these committees shall be comprised of three or more representatives designated by the union and three or more representatives designated by the employers. Each side of the committee shall have equal vote. Sec. 17.12 provides that the Port Committee shall maintain and operate the dispatching halls, exercise control over registration, decide questions regarding dispatch and adjudicate all grievances and disputes under Sec. 17. On page 38, Sec. 17.26 provides that the Coast Committee has jurisdiction to

consider certain issues presented to it and Sec. 17.261 that any decision of the Joint Port Labor Relations Committee or arbitrator claimed to be in conflict with the agreement shall be subject to and immediately referred to the Joint Coast Labor Relations Committee and if they cannot agree to the Coast Arbitrator. It is interesting to note that mere conflict claimed with a contract entitled either party to a grievance to go to the next higher step, while the Master Agreement of 1952 only permits this from the Joint Port Committee, if the parties cannot agree.

Page 43 of Ex. 2, signed in August 1965 covers discipline and in Sec. 17.71, gives the employer the right to return to the hall any man who is incompetent, insubordinate or fails to perform his work as required and Sec. 17.73 provides that any man who feels unjustly agrieved by being returned to the hall may have his grievance reviewed as provided by 17.2 et seq. and the following section 17.74 provides that in the case of return to the hall without sufficient cause, the Joint Port Labor Relations Committee may order payment for lost time or reinstatement without pay for lost time. In Sec. 17.81 (quoted on page 23 of this brief) strangely enough provides that all clerks shall perform their work conscientiously and with sobriety and "with due regard to their own interest" shall not disregard the interest of the employer. It goes on to spell out that a clerk must be guilty of deliberate bad conduct in connection with his work or through illegal stoppage may be fined, suspended or in repeated offenses his registration cancelled. The employer's sole remedy under this seems to be to file with the union a complaint and that the union then notifies the Joint Port Relations Committee of its decision within fifteen days and the employer need not appear.

Were this in effect, no clerk could be punished except for deliberate

misconduct as spelled out in the section, and that only upon repeated offenses could his livelihood be taken. Impliedly, he is subject to punishment for a lack of sobriety. Section 17.8 provides that there shall be penalties for work stoppage, assault, pilferage, drunkeness and other offenses. In view of the section immediately following it, it could only be deliberate bad conduct or work stoppages, intoxication and assault or pilferage that could be punished.

On page 44 of Ex. 2, there is Sec. 17.811 that if within thirty days after an employer is dissatisfied with the disciplinary action taken under Sec. 17.81, then the procedure under Sec. 17.82 may be followed which shall also be applicable in case of clerks not members of the union.

Sec. 17.82 provides that the Joint Port Labor Relations Committee has power and duty to impose penalties on clerks who are found guilty of stoppage of work, assault, refusal to work cargo in accordance with the provisions of the agreement, or who leave their job before relief is provided or who are found guilty of pilfering or broaching cargo or of drunkeness or who in any other manner violate the provisions of the agreement or any award or decision of an arbitrator. Obviously mere negligence is not grounds for discipline.

On page 44 of Ex. 2 at Sec. 17.821 there is provided assault in which the minimum penalty is one year suspension from work and for a second offense mandatory cancellation from the registration list and it provides that such conviction shall not be dependent upon the existence of a prior court decision nor shall determination of guilt await a court decision. Sec. 17.822 provides for pilferage and the first offense shall be a minimum of sixty days suspension from work and for a second offense mandatory cancellation of the registration list. Sec. 17.823 covers

drunkeness or smoking in prohibited areas in which the first offense requires the suspension of fifteen days and a second offense a suspension of thirty days and for succeeding offenses the minimum penalty is sixty days suspension.

Page 45 of Ex. 2, Sec. 17.84 provides that in the event of disagreement of the Port Labor Relations Committee as to the imposition of a penalty, the issues shall be processed immediately through the grievance procedure and to the Area Arbitrator if necessary. Sec. 17.85 states that these rules and penalties hereinabove provided are applicable to both registered clerks except that a more stringent rule or penalty is applicable to limited registered and nonregistered clerks (that is non-union men). In amplification of this at the top of page 46, Sec. 17.851 provides that more stringent rules and penalties than those provided hereinabove are applicable to limited registered clerks or to non-registered clerks or to both such groups as may be adopted or modified by the unanimous action of the Coast Committee and subject to the control of such committee when so exercised.

We need only observe that the rule as to union and non-union employees is different but also that even as to non-union men such as Law, if this provision of Ex. 2 were in effect, the attempted punishment and the procedure was not at all in accordance with the contract and consequently in breach thereof.

II. THE EXCLUSIVE STATUTORY BARGAINING AGENT, THE DEFENDANT ILWU, MAY NOT DELEGATE ITS AUTHORITY TO SOME OTHER ENTITY, THE DEFENDANT, LOCAL 34.

It is a basic rule of law that an agent in whom is reposed trust or confidence, or who is required to exercise discretion or judgment, may not entrust the performance of his duties to another without the

consent of the principal.

2 C. J. 685, Agency Sec. 342.

Under the federal law, an exclusive statutory bargaining representative is granted broad powers and discretion to bind all of the workmen within the classification from which the agent is elected. Only the statutory collective bargaining agent has this authority to represent or to bind the various individual employees. Where it involves any matter of discretion or skill or judgment it cannot be delegated.

In the case at bar it is admitted and the testimony throughout that the exclusive bargaining agent for all of the ship clerks is the defendant ILWU. Except to lend its name and delegate its authority, this defendant took no part in the proceedings. It is not contended any notice was given to this defendant ILWU. It is not contended that this defendant ILWU did any act or thing in the particular proceedings except to lend its name and authority to the defendant Local 34.

The statutes and the decisions of both the courts and of the administrative agencies have very definitely prescribed the authority and limit of this statutory exclusive bargaining agent's authority and power together with the field in which it may exercise its judgment, its skill and discretion is obviously void and beyond its authority.

It has never been contended that in the initial stages and in the first phase of any grievance procedure where a grievance is brought by an employer that the exclusive collective bargaining agent may abrogate its duty or even delegate it to another nor may it as the evidence shows appoint some persons to perform its power, discretion, skill and judgment and who do so either negligently or wrongfully.

III. IT IS THE DISCLOSED WRITTEN COLLECTIVE BARGAINING AGREEMENT THAT IS INCORPORATED IN AND GOVERNS ALL EMPLOYER-EMPLOYEE RELATIONSHIP UNDER THE SCOPE OF THAT COLLECTIVE BARGAINING AGREEMENT.

We are faced in this matter with an unusual problem that there is a disclosed collective bargaining agreement consisting of the writings set forth in the complaint starting with the Master Agreement for Clerks, etc. of 1952 (Ex. 1 in evidence).

We are then faced with the problem that there is contended to be some kind of understandings not yet reduced to writing that constitutes this agreement varying and changing this particular contract. This best appears from Ex. 3, the deposition of Mr. Paul St. Sure, former president of the defendant PMA. In this it is contended that some kind of agreements varying these writings have been determined upon but not their wording and not yet reduced to writing. It is also contended that there are certain practices that vary, alter and amend this disclosed writing. It is also contended that the tail wags the dog by the various committees existing under the collective bargaining agreement in fact change this agreement by their minutes or even by their intentions and understandings. Indeed even awards of arbitration are not final but subject to agreements to change not yet reduced to writing.

We then have this negotiated contract reduced to writing and execured as Ex. 2 in August 1965. The question then is, which agreement is applicable?

Congress in the Landram Griffith Act, Section 104 (29 U.S.C.A. 414) passed a wholesome and necessary law permitting any employee to determine the terms of a collective bargaining agreement by inspection of the written documents. This Act of Congress would be wholly defeated

and meaningless if it were proper to show an employee under this act a contract, and then to permit the union and the employer to contend that this is not the contract, but it is materially changed and altered by parol and secret agreement, or by waiver or conduct of the employer and the union or by other breaches of the contract. Section 104 was enacted by Congress to correct a vicious practice of the union and the employer having secret agreements very disadvantageous to the workingman. When differences arose, the workingman was faced with secret agreements. The purpose of Congress was to permit the employee to learn the full terms of the collective bargaining agreement under which he was employed. To permit secret or oral understandings or modifications as contended by the defendants and upon which the trial court purportedly acted, is to make the Act of Congress meaningless, and to defeat its very purpose.

The National Labor Relations Act section defining unfair labor practices requires the reduction to writing of any agreement when demanded by either party. We have in the case at bar in Ex. 1, an express provision that that writing can be changed only by a subsequent writing. We believe this is a sufficient demand under this statute to require any changes to be reduced to writing.

It is the known and disclosed collective bargaining agreement that is implied into the term of every master and servant relationship of every ship clerk in the Port of San Francisco when the clerk reports and commences his employment. It is not the oral understandings, practices or modifications from breaches that is implied into this contract of employment. It is the written and disclosed collective bargaining agreement that is final and conclusive between all parties. To hold otherwise, would result in chaos.

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Mr. St. Sure testified in his deposition as to whether a person employed by the American President Line on a dispatch as a clerk and how he would be paid. Mr. St. Sure testified ordinarily he would not be employed by the steamship company. He would be employed by a stevedore or a terminal operator. It is obvious therefore that not the shipper or the shipping line or the steamship company employs the clerk, but a stevedoring company or a terminal company employs those dispatched by the hiring halls and paid through PMA. This is very enlightening as to what is the actual position of PMA. PMA, the Pacific Maritime Employers Association, exists solely to represent employers employing longshoremen, clerks, and the related classifications. As such, it is grist to this defendant's mill to keep the waterfront in constant labor turmoil, for then they can justify their existence, the large number of employees and the extensive charges for services provided the employers. No person, not even Harry Bridges, could be responsible for the turmoil and chaos that has existed on the waterfront in this matter but it must be aided and abated by the employers. This is just what has happened and it is done by not having a definite and exact written contract which the courts and Congress have deemed necessary for the proper functioning of and peace in the master and servant relationship in such industries.

We therefore see that there are not exact rules by which the employer and the employee and the employer's associations or unions may live, but vague and indefinite understandings and not written or reduced to writing. We see practices which are claimed to be in accordance with some vague contract but not appearing in any document but in contravention of those documents. The result is inevitable chaos on the waterfront and in the maritime industry in and around the Port of San Francisco.

The evidence in the record and the contentions in this case clearly point out this problem.

We believe that it clearly presented in this case that the collective bargaining agreement is wholly the writings that were disclosed at the time and only those writings. The practices, customs and understandings not yet reduced to writing and signed, are obviously no part of the collective bargaining agreement. The contract is not a living breathing thing that snorts, rears and balks according to the particular occasion and the interest of the particular employers' association or of the particular union, under the particular circumstances, for that is chaos.

Plaintiff's counsel in this case, is counsel in the Federal Court case of Alexander, et al. vs. PMA, et al., which has been before this court twice, once reported in 314 Fed. 2d 690, and this court's case No. 18,324. It came before this court a second time and is reported in 332 Fed. 2d 266 (Certiorari denied 379 U.S. 882) and this is case in this court No. 18,913.

In this case, the testimony of the defendant and their members and officials are clear beyond all questions. Those who are members of the union are known as "book men", and have the designation of "registered". Those who are not admitted into the union, and they are almost as numerous as those who are "book men" are called nonregistered or "social security men". A different rule applies to each:

1. The "book man" is entitled to be dispatched to a job for its duration and in preferance to all others. The non-union man must be dispatched for only one day, and only after all union men have been dispatched.

2. The earnings of a "book man" are far greater than those of the non-union men who get only the left over crumbs and who are not paid at the same rate and who are not granted the fringe benefits of the Kaiser

Plan for themselves and their family, or the retirement benefits or the mechanization fund (the mulitmillion dollar fund) nor do they have any of the other fringe benefits including vacation pay.

3. This case vividly points up the fact that a separate procedure for disciplining is applied to the union member than to the non-union man such as Law. Even the current contract, Ex. 2, provides for diferent and more harsh punishment for the non-union man.

4. The union man votes for and elects the dispatcher who selects he jobs and dispatches the men from the hiring hall. The non-union man has no such standing. The union man elects the representatives who sit on the Port Committee but the non-union man has no such vote or selection. The results are quite obvious. There would not be action of this defendant Port Committee and thus mere failure to act by the union would have left Law without any punishment, and with the employers would have been required to take it to arbitration or the Coast Committee if they deemed such a step proper.

The history on the waterfront is well documented in the reported decisions. Prior to 1952 there was a collective bargaining agreement which provided that there should be preference of employment and registration for union members by express provision in the contract. This was adjudicated illegal and void in the proceedings involving the defendant ILWU and the defendant Local in two administrative agency decisions reported in 90 NLRB 1021 and 89 NLRB 284, and by this court, the U.S. Court of Appeals, Ninth Circuit, in 211 Fed. 2d 946, for the specific reason of this preference of employment to and registration of union members. This very point that was adjudicated illegal and void was carried over and blanketed into and made a part of Ex. 1 in evidence,

the Master Agreement of 4 April 1952 by the provision that it gave preference of employment and dispatch to those who were registered on June 1, 1951, under that illegal and void contract. (See page 2, Ex. 1, Sec. 3 - "Preference of Employment" subdivision a). Page 14 of Ex. 1, Sec. 14 "Registration" subdivision (a) provides:

> "All registration shall be by mutual consent, except that this section shall not deprive either party to the agreement from demanding additions to or subtractions from the registration list as may be necessary to meet the needs of the port."

The record in this case shows by the testimony of the defendants' own witnesses that this means "book men" as distinguished from those such as Law who are not union men and are sometimes referred to as "social security men" (which arises from the employment records of the employee not bearing a registration number but the employee's social security number).

The same practice condemned and found illegal by the administrative agency and by this court has thus not only been carried over but is carried into effect by use of the designation of "registration".

The law is now well settled by Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, that the statutory exclusive bargaining representative owes a duty to all employees, whether union or non-union, to treat all of them equally, and to discharge this duty not in a diseltory way, but faithfully and impartially, and for failure to do this, that there is a liability.

The Vaca v. Sipes case, 386 U.S. 171, directly holds that this statutory collective bargaining agent is the exclusive representative of of the employee in all grievance matters and that a failure to perform this statutory duty is an unfair labor practice, nevertheless this is not pre-empted and to thus prevent the courts from administering or hearing

these matters involving unfair actions of the statutory collective bargaining agent. This Vaca case also held that where a matter had been carried through four steps on a grievance by an employee, that the union collective bargaining agent was not required to take a fifth step involving extensive costs and procedures on arbitration initiated by and carried on for the employee if there was reason to believe it was not a meritorious matter. On the other hand, in the case at bar, we have the initial proceedings of a grievance by the employer in which the defendant ILWU delegated its authority to another entity and this other entity's president and other committee members did not even make a prima facie effort to learn the facts nor did they even understand the factual matter, but spent a possible five minutes and a maximum of fifteen minutes with Mr. Law. This group then assured Mr. Law that they would protect him, and then proceeded to do the very opposite.

In the case at bar, Mr. Law when he left the committee was led to believe that the various members of this union committee intended to and would not only represent him but protect him on all proceedings by the employer upon the employer's complaint. This is certainly not discrimination in any sense of the term. Even when the minutes, the exhibit in evidence, of the defendant Port Committee had become known, there was no contention or showing that there was anything but a unilateral action by the employers when the specific contract requires the action to be by both the employers and the employee members. It therefore appeared upon its face not only that there was a breach of the contract providing for a step in a grievance procedure in which there was neither notice nor charges nor an opportunity to appear and defend, but also an act unilaterally done by the employers in violation of the contract and barring Law from

his livelihood, by refusing him further dispatch. A trial in absentia is obviously no part of any grievance procedure under any possible theory. Law then sought to avail himself of the grievance arbitration procedure, both by the disclosed writings then in existence and by the claimed practices and alleged secret oral understandings between the defendants. The effort and the response did not bring any contention other than that he was no longer to be dispatched and that none of the various levels of the grievance procedure would hear his matter either as to his dispatch or as to his wage dispute. Certainly there was no contention that he was properly notified or that he had an opportunity to appear or defend himself or indeed that any person or entity other than the defendant ILWU who had not theretofore had any part of the proceedings, was the exclusive collective statutory bargaining agent and the contention that under a section of the NLRB he had a right to talk to his accuser, a corporation, the defendant Matson Terminals. It should be pointed out that is only one of some hundred employers of ship clerks in the Port of San Francisco and who had no power to dispatch him from the hiring hall or indeed to use his services without a dispatch under the contract as disclosed.

We should point out that under the disclosed contract, Ex. 1, the registration was confined solely to "book members" and synonymous with that. We should point out that under the disclosed contract a registration can only be given with the mutual consent of the employers association and the union, and the union has throughout refused to give its consent to this registration without the employee being a "full book" man of the union, Local 34, and the ILWU and then only to a portion of the group required to fill these jobs. This matter has been raised collaterally when the NLRB has been asked to hold an election to certify a statutory collective

bargaining representative as in Phoenix Tin Ware Co., Inc. (1952) 100 NLRB 528, where the contract provided that no tinsmith, welder, etc. should be employed unless "recognized by the union". In the Phoenix Tin Ware case, the NLRB held that since "recognition" was not defined in the contract, and gave the union a veto on employment of any employee, this provision in the contract was invalid, so the Board could not hold an election for want of a valid bargaining agreement. The Phoenix case, 100 NLRB 528, turns on and follows Newton Investigation Bureau, (1951) 93 NLRB 157, also a decision involving the question as to whether there should be an employee election called. This in turn required a determination as to whether there was a valid collective bargaining agreement, as the agreement in effect had a clause that when the employer filled a vacancy or created a new position, he could choose his own employees, "however, such person employed are satisfactory to both parties to this agreement". No limit was placed on the grounds of the union's discretion. The decision held that this contract provision as to requiring union approval for hiring was beyond the intent of the union security provisions of Section 8 (a) (3) of the Act. Obviously, then the provisions as to registration in the Master Agreement 1952 (Ex. 1) is to be measured by the same test and will fall by the same provision.

CONCLUSIONS

1. Law was tried and convicted in absentia, without proper notice and without an opportunity to appear and defend himself. It appears from the record to be a unilateral action of the employers. Consequently, on either score it is a violation of the contract. If the new contract, Ex. 2, is applicable, any punishment of forever barring him from employment is obviously in violation of that contract.

2. The plaintiff Law was lead to believe by the Committee of the defendant members of Local 34 that he was not to be disciplined, particularly in a proceedings where it required joint action of both the employers and of these union employees. The action of Herman confessing him guilty and in the other members sitting by and acquiesing in their silence, and acquiesing in the punishment is obviously in violation of the contract and is clearly a violation of duty if these persons could have been delegated power by the exclusive collective bargaining representative, the defendant ILWU.

3. The contract is the known and disclosed contract. It is not some ideas not yet reduced to writing and signed. It is not customs and practices, and it is not violations of the disclosed written contract. Only the valid portions of the written contract are the true collective bargaining agreement. It cannot include the illegal portions in violation of law.

4. The evidence shows that there is two rules to apply, one to union members accused by an employer, and the other to non-union employees such as Law. There are separate procedures and separate penalties. As such, it is clearly a violation of law.

5. The employee Law was entitled to more than desolatory and faithless representative in the first and initial stage of the grievance procedure in the complaint by the employer against him. The statutory exclusive bargaining representative, the defendant ILWU, could not delegate its matters of judgment, discretion and skill to the entity Local 34 and effort to do so is clearly contrary to law.

6. The plaintiff Law is entitled to follow his lawful occupation that he has followed for 9-1/2 years. The conviction in absentia must

be annulled and the plaintiff granted his damages.

Justice requires that this judgment be reversed.

June 10, 1968.

Attorney for plaintiff

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 & 39 & 40 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

APPENDIX

Defendant's Exhibit:	Evidence
A	120
B	121
3-B	234
Plaintiff's Exhibits:	
5	10
6	17
7	20
8	20
9	22
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10-A	23
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12	37
12-A	37
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14	38
15	208